IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SUIT NO. 91 OF 1980

Jayant L. Shah. . .. Plaintiff.

vs.

Naranji Lalji Khona. .. Defendant.

Mr. Vijay Dhadam i/by K.M. Mehta for plaintiff.

Mrs. U.K. Shah i/by K.D. Shah for defendant.

CORAM : S.U. KAMDAR, J.

DATE : 2nd May, 2006.

ORAL JUDGMENT :

. The present suit is filed for a decree of declaration that the defendant has no right, title or interest to carry on the business of Messrs. Narshi Hansraj or any other business in the suit premises namely, Shop No. 7-B, Navratan Villa, 279A, Lakhamshi Napu Road, Matunga, Bombay 400 019 and that he is a trespasser in respect thereof. By prayer clauses (c) and (d) a decree for possession couched in the form of mandatory as well as prohibitory injunction has been sought. Prayer clause (e) seeks a decree for a sum of Rs. 9,900/- towards the arrears of royalty for a period from

1.11.1978 to 2.12.1979 at the rate of Rs. 750/- per month. By prayer clause (f) damages in the form of compensation or future mesne profits at the rate of Rs. 25/- per day has been sought. There are various other interim reliefs in the present suit.

2. Some of the material facts, briefly enumerated are as under :-

3. The original plaintiff Lakchand Dhanji Shah was an executor appointed under a will dated 19.3.1977 of one Narshi Hansraj Khona alias Sha Narshi Hansraj who expired in Bombay on 12.10.1978. The said original plaintiff who was the executor has also expired and his legal heir has been brought on record.

4. It is the case of the plaintiff that prior to 3.11.1967 the said original plaintiff Lakmichand Dhanji Shah, the defendant Naranji Lalji Khona and one Manekji Lalji Lalka were carrying on business in partnership in the name and style of Messrs. Narshi Hansraj. The said partnership firm was dealing in grains and grocery items. The said partnership firm was dissolved with effect from 3.11.1967 and all the assets and liabilities of the said firm were taken over by the said deceased Narshi Hansraj Khona and thus he became entitled to the said business. A deed of dissolution was executed between the parties

on 15.11.1967.

5. It is the case of the plaintiff that since the deceased Narshi Hansraj Khona was not in a position to carry on the business he entered into a conducting agreement with the defendant for a period of three years from 3.11.1967 to 2.11.1970 on the terms and conditions mutually agreed upon between the said deceased Narshi Hansraj Khona and the defendant herein. The said terms and conditions of the conducting agreement were reduced in writing and the said was executed between the parties in or about November, 1967. It is the case of the plaintiff that under the terms and conditions of the said conducting agreement it is inter alia provided that the said agreement will be for a period of three years i.e. from 3.11.1967 to 2.11.1970. Under clause 3 of the said agreement it has been recorded that the conductor i.e. the defendant herein has been given possession of running business, the stock-in-trade, furniture, fixtures and other articles and things relating to the said business a list whereof is annexed to the said agreement. The annexure to the said agreement shows the stock-in-trade of the sum of Rs. 15,754.34 of the various items as set out therein. It also contains details of the furnitures and fixtures of the said shop premises. Under clause 7 of the said agreement it was provided that the said agreement is

entered into for the purpose of running the business on the basis of royalty amount due and payable under the agreement and the conductor shall have the user of the said premises under leave and licence and no sub-tenancy rights are created in favour of the conductor or are intended to be created in favour of the conductor. It has been further mentioned that the mere right to use the said premises for the purpose of running the said business is allowed under the said leave and licence. There are various other terms and conditions of the said agreement. It is the case of the plaintiff that under the terms and conditions of the said agreement the business and the shop premises were handed over to the defendant and the defendant agreed to pay monthly royalty charges of Rs. 750/- for conducting the said business.

6. It has been the further case of the plaintiff that after the expiry of the said agreement a fresh agreement has been entered into on 17.2.1971 between the said deceased Narshi Hansraj Khona and the defendant herein on the same terms and conditions. It was provided thereunder that the said agreement is executed for a further period of five years from 17.2.1971 to 16.2.1976. The said agreement is also brought on record in evidence. It is the case of the plaintiff that the said agreement came to an end by efflux of time on 16.2.1976

however the defendant did not hand over possession of the said shop and continued to conduct the business and continued to make payment of the royalty amount of Rs. 750/- to the said deceased. The deceased paid rent in respect of the said premises to his landlord. It is the case of the plaintiff that after the death of Narshi Hansraj Khona the defendant approached the landlord for getting the rent receipt transferred in his name and the landlord refused to do so and, therefore, the rent receipt has continued to be in the name of the deceased. The defendant made direct payment to the landlord to create false evidence to usurp the premises and accordingly it was necessary to file the present suit. It is the case of the plaintiff that on 17.3.1979 a notice was issued by the advocates of the said deceased to the defendant calling upon the defendant to hand over the possession of the said premises but the defendant refused to do so by reply of his advocate's letter dated 4.4.1979 and made false contention claiming right, title and interest in the said property. The letter of the defendant's advocate was duly replied by the original plaintiff's advocate through their letter dated 5.11.1979 which was further replied by the defendant's advocate by letter dated 27.11.1979. In view of the fact that the defendant was not inclined to vacate the premises and hand over the same to the plaintiff herein along with the running

business, the plaintiff has filed the present suit. The said Narshi Hansraj Khona died on 12.10.1978 leaving behind his last will and testament dated 19.3.1977 and appointed original plaintiff as the executor of the said will. The said original plaintiff also expired and his son who is the beneficiary of the said estate of the deceased Narshi Hansraj Khona and also of the executor and trustee in place of the original plaintiff has come on record and seeks to continue the present suit.

7. The present suit is accordingly filed for declaration that the defendant has no right, title and interest and claim possession of the said property and claim relief that the defendant should remove himself from the suit premises. The defendant has filed written statement on 16.4.1980. It has been contended therein that the defendant is in fact a protected licensee under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as Bombay Rent Act) particularly in view of the amendment protecting the licensee as on 1.2.1973. In that view of the matter it has been submitted that the dispute between the licensor and the licensee or landlord and tenant is not maintainable in this Court but under Section 41 of the Presidency Small Causes Courts Act or under Section 28 of the Bombay Rent Control Act, 1947. It has been thus submitted

that the Small Causes Court has exclusive jurisdiction and this Court has no jurisdiction to entertain and try the present suit and the suit is liable to be dismissed. It has been submitted that the original tenant is claiming right in the property on the basis of tenancy in his favour through the will and it is settled law that no tenancy can be bequeathed by a will and, therefore, also the plaintiff has no right, title or interest to maintain the present suit. It has been further submitted that the defendant is a nephew of the original plaintiff and thus a member of the family of the defendant under section 5 (11) (c) and, therefore, the defendant is a tenant and is entitled to the said property. In any event, it has been submitted that the defendant is a protected licensee because the two agreements are in fact leave and licence agreements protecting the defendant as on 1.2.1973 as a tenant. Apart from the aforesaid submissions, on merits, it has been submitted that both the agreements of conducting which have been entered into and the terms and conditions thereof indicate that in fact there was a transfer of tenancy in favour of the plaintiff herein. The defendant has put forth a case that he is a nephew of the said deceased. The defendant further submits that the deceased having no son and having only one daughter the defendant was brought up as a son by the deceased Narshi Khona since four years age.

Even his marriage was performed by the said deceased. In that circumstances, the original deceased in fact handed over the possession of the said business to the defendant and he was taken as a partner in the said business right from 1948 and he continued to be the partner till 1967 and it is only the original plaintiff was hostile and was not running the business with the defendant that the said firm was dissolved and the right title and interest was taken over by deceased Narshi Khona and in turn he allowed the defendant to take over the said business and run the same. It was submitted that because at that time it was not possible to sub let the premises it was agreed that the leave and licence will be created in the form of a conducting agreement so as to avoid any trouble from the landlord. It was submitted that the said agreement is accordingly arrived at with a view to circumvent the provisions of the Rent Act then existing. It has been further submitted that a sum of Rs. 750/- per month was paid as a rent because under the said agreement the defendant was using the said premises. It has been denied that there is any conducting agreement and/or that the conducting agreement came to an end by efflux of time. It has been submitted that the said agreement is in fact totally in favour of the defendant and, therefore, the defendant rightly refused to vacate the premises.

8. On the aforesaid pleadings between the parties, the following issues were framed.

1. Whether this Court has jurisdiction to entertain and try the suit?

2. Whether the plaintiff can claim tenancy rights in respect of the suit premises on the basis of Will of Narshi Hansraj?

3. Whether the defendants prove that he was carrying on business in the suit premises on leave and license granted to him by deceased Narshi Hansraj at the time of his death and is protected under the provisions of Bombay Rent Act ?

4. Whether the plaintiff proves that the defendant was given premises for conducting the business of Narshi Hansraj and he cannot claim any right whatsoever after the death of Narshi Hansraj and not entitled for the protection under provisions of Bombay Rent Act?

5. Whether conducting agreements dated 15th November 1967 and 17th February 1971 are sham and were not to be acted upon and were

executed with a view to circumvent the provisions of Bombay Rent Act ?

6. Whether the defendant is protected tenant or licensee of the suit premises ?

7. Whether the plaintiff proves that defendant is a trespasser in respect of the suit premises.

8. What reliefs ?

9. Both the parties have led oral evidence which is on record. Parties have also tendered their respective documents which are also taken on record. On a perusal of the evidence the case has been reiterated. The evidence has been lead of the plaintiff which has come on record. Subsequently he has tendered various documents. Similarly, the defendant has also led the oral evidence of Naranji Lalji Khona who is the defendant herein. As far as the oral evidence is concerned by and large it is on the same line as the contentions of the parties for claiming leave and licence agreement in respect of the suit flat. However, the crucial is the documentary evidence in the present case. In so far as the documentary evidence is concerned both the agreements are produced by the plaintiff.

First agreement contains the annexure as mentioned in the said agreement whereas the second agreement does not contain any annexure though clause 3 of the said agreement refers to the annexure in respect of stock-in-trade and other furnitures and fixtures. Then the correspondence is produced by and between the parties. The defendant has on the other hand also produced large number of documents. The defendant has produced his books of accounts firstly to indicate that in fact the so called claim of handing over stock of Rs. 15,754/- mentioned in the annexure to the first agreement was in fact not a handing over of the stock towards conducting the business but the same was purchased by the defendants and the books of accounts were produced to show that the said amount was paid. The accounts are also produced to show that Rs. 750/- was in fact paid per month towards the rent and was debited accordingly in the books of accounts. The said payment of Rs. 750/- per month has ben made in part payment of the supply of the material of shop and part paid in cash to the said deceased Narshi Khona. Thereafter the defendant has produced the death certificate of the wife of the original defendant as also produced the rent receipts to show that in fact Maniben Narshi Khona was the tenant. The defendant has also

produced a Shops and Establishment Certificate and licence of the relevant period which stands in the name of the defendant. A licence under the B.M.C. Act is also produced which is also in the name of the defendant in respect of the suit premises. The defendant has also produced sales tax returns and the sales tax invoices indicating that the defendant was independently carrying on the business and his business has been carried on in his own name and not in the name of the deceased Narshi Khona. He has also produced official translations of various entries of ledger indicating the aforesaid payment to the deceased herein.

10. On the aforesaid evidence the matter was heard by me. The learned counsel for the plaintiff has submitted in his written submission that the suit is for the declaration that the defendant has no right, title or interest therein. It has been submitted by the plaintiff that on the plain reading of the terms and conditions of both the agreements it is clear that it is actually a conducting agreement and not a leave and licence agreement. It has been submitted that thus it is clear that the deceased Narshi Khona has not created any leave and licence or a monthly tenancy in respect of the defendant herein and in view thereof it has been

submitted that the said premises is required to be returned along with the running business by the defendant to the plaintiff herein. In so far as the plaintiff is concerned he is named to be the beneficiary of the will of the deceased Narshi Khona. It is his case that his father was appointed as executor in respect of the said will and the will being probated and probate issued by this Court on 23.10.1992 he is entitled to maintain the present suit and claim possession of the said premises. It is his case that under the said Will he is the beneficiary. Under clause 3 of the Will he has stated that the entire estate has been conferred on him in view of the fact that he is the daughter's son of the deceased. The said clause 3 reads as under :-

> "3. I further direct that my said executor shall after the death of my wife and in case my wife predeceases me shall pay the estate left, if any then remaining in trust to my daughter's son namely Jayant Laxmichand Dhanji or his heirs executors administrators for his use and benefit absolutely for him."

He has further submitted that under the agreement both under clause 3 and under clause 7 it has

been expressly provided that the said agreement is entered into only for the purpose of running the business on the basis of royalty and thus he submits that there is no question of any leave and licence agreement being entered into. He further submits that under the first agreement the annexure was also made to the said conducting agreement indicating that at the time of handing over the business the stock-in-trade as well as various furnitures and fixtures are also handed over to the defendant. It has been thus submitted that the aforesaid thus indicates that there was a mere conducting agreement and not leave and licence agreement in favour of the defendant herein. He has further submitted that the terms and conditions of the second conducting agreement are also identical to the first conducting agreement, though it is true that annexure is not annexed to the said original agreement though the same is referred to in clause 3 thereof. In his submission the same should not make any difference because the said annexure which formed part of the first agreement should be read as part of the second agreement also because it is identical in every respect. In so far as the documents produced by the defendant are concerned, particularly books of account it has been submitted that in so far as the evidence produced by the defendant is

concerned, there is no merit in the case of the leave and licence and tenancy even though the defendant is holding a licence as well as the sales tax assessment are in respect of the business run by the defendant in his own name and not in the name of Narshi Khona but still according to the plaintiff the present suit must be decreed as the terms and conditions of the conducting agreement are proved by him and thus the said suit is liable to be decreed in favour of the plaintiff.

11. On the other hand, the learned counsel appearing for the defendant has contended that this Court has no jurisdiction to entertain and try the present suit. It has been contended that infact exclusive jurisdiction is vested in the Small Causes Court by virtue of provisions of Section 41 of the Presidency Small Causes Courts Act if the defendant is held to be a licensee or if the defendant is held to be the protected then under section 28 of the Bombay Rent Act as in force at that point of time the suit should have been filed in the Small Causes Court and not in this Court. In so far as the the above contention is concerned, the learned counsel for the defendant has submitted that by oral evidence as well as by documentary evidence the defendant has been able to establish that the terms and

conditions of the conducting agreement though so mentions are in fact not the conducting agreement between the parties. He has submitted that the conduct on the part of the deceased Narshi Khona itself indicates that it was not a conducting agreement as sought to be made out. Firstly he has drawn my attention to the annexure to the first agreement which indicates that certain goods have been handed over as stock-in-trade to the defendant by the deceased Narshi Khona when in fact he has paid for the said goods. He has also produced the necessary books of accounts to establish the entries of the relevant years indicating the payment thereof. He has further submitted that therefore, advisedly no annexe for stock-in-trade was prepared at the time of execution of the second agreement and therefore the second agreement has no annexure thereto. He has further submitted that the second agreement indicates that the same was executed for five years and there was no stock-in-trade. Even at the expiry of the first agreement no stock has been taken and that shows that in fact the agreement is not for conducting the business. It has been submitted that if it is conducting agreement then least is expected of the proprietor or the plaintiff to take stock of the goods which were lying and seek account of the goods which are purchased and sold by the

defendant pursuant to the conducting agreement. However, no such case has been established by the plaintiff which indicates that in fact the agreement though is styled as conducting agreement but in fact it was a leave and licence agreement so as to circumvent the provisions of the Bombay Rent Act because deceased Narshi Khona himself was a tenant and he was not interested in his tenancy being jeopardised by the landlord by sub-letting the same which was prohibited under the provisions of the Bombay Rent Act. It has been further submitted that on the basis of the evidence of the plaintiff, the defendant and the daughter of the deceased namely, Champaben Laxmichand Shah it is clear that in fact there is no conducting business agreement but it was a leave and licence agreement. The learned counsel for the defendant has also submitted that it is now settled law that the tenancy cannot be bequeathed by the deceased Narshi Khona in favour of the plaintiff herein as has been held in the judgment of the Division Bench of this Court in the case of Dr. Anant Trimbak Sabnis v. Vasant Pratap Pandit, reported in AIR 1980 Bombay 69, then in the judgment of the Apex court in the case of Bhavarlal Labhchand Shah vs. Kanaiyalal Nathalal Intawala, reported in (1986) 1 SCC 571 and the judgment of the Supreme Court in the case of Vasant Pratap Pandit vs. Dr. Anant Trimbak

Sabnis, reported in 1994 Mh. L.J. page 1450. The learned counsel relying upon the aforesaid judgments submitted that tenancy cannot be bequeathed at all by Narshi Khona and the so called claim of the plaintiff on the basis of the bequeath of the tenancy is without any merit. Admittedly the plaintiff was never in possession of the suit property and, therefore, he cannot claim tenancy under section 5 (11)(c) though he may be one of the family member of the said deceased.

12. I have heard the learned counsel for both the parties. Various issues are framed by the Court and my findings in respect thereof are as under :-

13. In so far as the present case is concerned, though it is an admitted position that though two conducting agreements are entered into by the deceased Narshi Khona and the defendant on the circumstances and the material and evidence produced on record it is established by the defendant that the said conducting agreements are in fact not conducting agreements but the agreements of leave and licences which have been executed by the deceased Narshi Khona. Apart from the aforesaid position I am taking into consideration the various evidence which has been

produced by the defendant in the present case. The conducting agreements which are also on record indicate that clause 2 provides for handing over of the stock-in-trade. However, the defendant has been able to establish that in fact it was not handing over of the stock-in-trade but in fact the said goods were purchased and he has produced the books of accounts to show payment in respect of each and every goods which has been purchased by him from the deceased Narshi Khona. He has also produced the books of accounts that he has been paying the compensation of Rs. 750/- fixed and not on the basis of the business profit which was earned from the said business. The fixed amount paid by the defendant is not in dispute though it is styled as royalty and not as compensation or rent. However, the most crucial document which has been produced by the defendant is that the defendant never conducted for and on behalf of the deceased Narshi Khona. He was conducting business in his own right and he has obtained all necessary licences independently including the Bombay Shops and Establishments licence, the BMC licence and various other licences as required. He has also assessed himself to the sales tax in his own name. He has filed the assessment record and the orders passed by the Sales Tax Authorities independently in his name which are on record. Furthermore, the books

of accounts indicate that the profit earned by the said business has been appropriated by the defendant exclusively to himself. It also indicates that even when some grocery items are delivered to the deceased Narshi Khona, in fact the amount has been adjusted against the payment of the royalty at the rate of Rs. 750/-. All the aforesaid circumstances, coupled with the oral evidence of the said defendant indicate that in fact the defendant was not conducting business on the part of the deceased Narshi Khona but he was running the conducting business in his own independent right independently and not at the instance or on behalf of the plaintiff. Clause 7 of the agreement is also very crucial. Clause 7 of the agreement consists of two parts. It states that though the business is given on conducting basis but when it comes to the premises the leave and licence agreement has been executed. There is no dispute that the defendant was in possession of he said premises exclusively and the deceased Narshi Khona was not in a joint possession. It is nobody’s case also in respect thereof. Thus, the defendant was actually running the business in his own right independently and exclusively and was not dependent upon the plaintiff herein. Thus, in fact the totality of the circumstances and the oral evidence led between the parties it is

established that the conducting agreement was in fact nothing but leave and licence agreement. It is now settled law that in case of the leave and licence agreement or a conducting agreement what is required to be seen by the Court is the true and correct intention of the parties at the time of executing the said agreements. It is not in dispute that original Narshi Khona was a tenant in respect of the said property. It is also not in dispute that at the relevant time sub-letting was prohibited under the Rent Act. Thus in my opinion the aforesaid evidence coupled with admitted facts an irresistible conclusion is that in fact the so called conducting agreement was nothing but a leave and licence agreement in favour of the defendant and it was not a conducting agreement in so far as the premises are concerned. Clause 7 in so far as the second part of the said agreement is concerned, reads as under :-

> "It is agreed that for the purpose of running the business on the basis of royalty under this Agreement and incidental thereto the Conductor shall have the user of the said premises under leave and licence of the Owner.
> (Emphasis supplied)

In my opinion, thus on an interpretation of the agreement read with the material circumstances and evidence produced on record it is established by the defendant that the agreement was entered into for a leave and licence. Once I hold that it was a leave and licence agreement then in that event this Court shall have no jurisdiction for two reasons. Firstly because the agreement between licensor and licensee is required to be filed before the Small Causes Court at Bombay under Section 41 of the Presidency Small Causes Court Act. Secondly in the present case, the leave and licence agreement was prior to 1.2.1973 and as on the date of 1.2.1973 there was a valid and subsisting leave and licence agreement. There is no dispute that leave and licence agreement expired only in 1976 by efflux of time. It is also on record that the defendant was in exclusive possession of the shop premises. Once these criteria are complied with, then in my opinion, as on 1.2.1973 the defendant as a licensee became a protected licensee by virtue of the amendment to the Bombay Rent Act by way of Section 15A and thus he is deemed tenant and he is entitled to protection of the Bombay Rent Act as existing then. If that is so, then under the provisions of Section 28 of the Bombay Rent Act, this Court has no jurisdiction to entertain and try the present suit. Even a suit between

licensor and licensee falls under Section 41 of the Presidency Small Causes Court Act and thereunder also suit for recovery of possession exclusively vests in the Small Causes Court. Thus, in view thereof I answer issue no. 1 in favour of the defendant and against the plaintiff.

14. In so far as issue no. 3 is concerned, I have already discussed and held that the defendant is a protected licensee and thus entitled to protection of the Rent Act. I also, therefore, answer issue no. 3 in favour of the defendant and against the plaintiff. My answer to issue no. 3 is in the affirmative. Once answer to issue no. 3 is answered in favour of the defendant as a corollary answer to issue no. 4 must be against the plaintiff and in favour of the defendant. In so far issue no. 5 is concerned, I again answer the same in favour of the defendant and against the plaintiff.

15. Issue no. 6 and issue no. 1 are overlapping and, therefore, my answer to issue no. 6 is in affirmative and in favour of the defendant and against the plaintiff.

16. In so far as issue no. 7 is concerned, my answer to the same is in the

negative. Once it is held that the defendant is a bonafide licensee, the answer to the said issue has to be in favour of the defendant and against the plaintiff.

17. I am of the view that in light of the fact that in the present case this Court has no jurisdiction to entertain the present suit, I am not inclined to go into the merits so far as issue no. 2 is concerned. Secondly, as far as issue no. 2 is concerned, it is not relevant and related to the plaintiff and the defendant in the present case because the issue no. 2 pertains to the claim of the plaintiff as a tenant vise-versa his landlord. Now this issue would also arise between the original landlord and the plaintiff because deceased Narshi Khona was a tenant and through him the plaintiff is claiming tenancy right. In that light of the matter, I am of the view that thus is not the issue which should be answered in this proceedings and the same can be determined in a suit between the original landlord of the premises and any person who is claiming tenancy thereof. In so far as the defendant is concerned, the defendant is admittedly claiming right through deceased Narshi Khona who is the grandfather of the plaintiff and therefore, in so far as this issue is concerned, even if they are protected licensee still issue

no. 2 as framed is not required to be determined in the present case and accordingly I decline to answer the same.

18. In the aforesaid light of the matter, I am of the view that the present suit must fail since this Court has no jurisdiction to entertain and try the suit between the plaintiff and the defendant herein. In that light of the matter, I dismiss the suit. However, there shall be no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SUIT NO. 91 OF 1980

Jayant L. Shah. . .. Plaintiff.

vs.

Naranji Lalji Khona. .. Defendant.

Mr. Vijay Dhadam i/by K.M. Mehta for plaintiff.
Mrs. U.K. Shah i/by K.D. Shah for defendant.

CORAM : S.U. KAMDAR, J.
DATE : 2nd May, 2006.

P.C. :

. For the reasons separately recorded the Court passes the following order :-

. In the aforesaid light of the matter, I am of the view that the present suit must fail since this Court has no jurisdiction to entertain and try the suit between the plaintiff and the defendant herein. In that light of the matter, I dismiss the suit. However, there shall be no order as to costs.